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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 538

HARRY GREGORY, ET AL., PETITIONERS

v.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Harry Gregory, Charles Van Vactor, and Casper Waters, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 17, 1951.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 122–134) are reported at 92 F. Supp. 770. The order of the Court of Appeals for the Sixth Circuit, affirming without opinion the judgment of the District Court (R. 269), is reported at 191 F. 2d 856.

JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1951 (R. 269). The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under Section 8 of the Selective Training and Service Act of 1940, as amended, a veteran promoted to a higher job after his return from military service is entitled to seniority in that job from the date upon which, in accordance with the custom and practice of the employment, he would have been promoted if he had not entered the military service, or whether he may be denied such seniority merely because he had no absolute contractual right to such promotion, or because nonveterans returning from furlough or leave of absence are entitled to seniority only from the date upon which they actually begin work in the higher position.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 308, are set forth in the Appendix.

STATEMENT

This action was brought by three restored veterans to enforce their seniority rights as machinist helpers under Section 8 of the Selective Training and Service Act of 1940, as amended (R. 2–5).[1] The district court's judg-

[1] The action was brought against the employer on behalf of all similarly situated veterans (R. 2), but before trial was ordered to proceed in behalf of only the individually

ment dismissing their petition on the ground that the assigned seniority rights were proper (R. 135) was affirmed by the court below (R. 269).

The veterans were employed as laborers by the Louisville & Nashville Railroad Company at the time of their induction into the armed forces in 1941 and 1942 (R. 123–124). By virtue of the then-existing collective bargaining agreement, laborers were entitled to be given consideration for promotion to positions in the skilled crafts "based on ability, merit and seniority" (R. 125). Upon their honorable discharge and return from the armed forces at the end of 1945 and the beginning of 1946, the veterans were restored to their former positions as laborers and shortly thereafter were promoted to machinist helpers with seniority from the dates upon which they would have been promoted had they remained in the continuous employ of the carrier (R. 56–57, 86, 123–124).[2]

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named veterans (R. 35). The collective bargaining agent of the carrier's employees, as well as certain employees who would have been adversely affected, if relief were granted the veterans, intervened as parties defendant (R. 34, 37, 38).

[2] Each veteran's seniority was fixed from the date on which a laborer with less seniority was promoted and began to work as a machinist helper, and he was placed upon the machinist helpers' seniority roster immediately ahead of the non-veteran machinist helper with less seniority as a laborer (R. 123–124). Although the court made no specific findings on the question of whether the seniority status assigned was that which would have been enjoyed but for military service, this may be assumed from the circumstances (see, *infra*, pp. 5–7).

In January 1949, an agreement between the railroad and the bargaining agent for the skilled crafts took away from the restored veterans their seniority as machinist helpers based on treating time in military service as time on the job, and changed their seniority to date from the time, after their return from military service, on which they first performed services as regularly assigned machinist helpers (R. 62, 126–127).

This resulted in the loss by each of the restored veterans of approximately three and one-half years seniority, the period of their military service (R. 127), and in their being given seniority status junior to employees over whom they had had greater seniority as laborers at the time of their induction into the military service, and with respect to whom they would have had greater seniority as machinist helpers if they had not gone into military service (R. 123–124).

The laborers' collective bargaining agreement did not create an absolute right to be promoted to the position of machinist helpers on the basis of seniority. The contract provision required only that laborers "be given consideration for promotion" and that promotion "be based on ability, merit and seniority * * * the Management to be the judge and no partiality to be shown" (R. 125). Under this provision the employer was authorized to hire as machinist helpers persons not

then in the employ of the carrier,[3] but it was also the custom and practice, when promotions were made from the laborers' class, to promote them, if qualified to perform the work, in order of seniority (R. 154, 156, 159, 160–161, 162, 164, 176, 178, 179–180, 230–231).[4]

[3] Petitioners do not claim seniority ahead of such employees who were hired as machinist helpers before they would have been promoted to that job.

[4] Numerous laborers were passed over for promotion because they were colored (denoted on the rosters by "C" or "Col.") (R. 99, 186). Others were not promoted in seniority order either because some fundamental physical or mental defects prevented them from qualifying as helpers (R. 177, 178, 187) or because they refused promotion for a variety of reasons (R. 164–165, 166, 197–198).

Fifteen laborers, excluding Negroes and veterans, were promoted to either machinist or boilermaker helper positions between the time the first petitioner (Waters) entered the armed forces and the time the first one to return (Van Vactor) was promoted (R. 78–85, 235–240). [The brief below of one of the respondents (System Federation No. 91) lists 32 (pp. 12–13), but 16 of these were Negroes who were discriminated against in promotion, and one, C. P. Wallace, was a veteran whose seniority was changed (cf. R. 236 with R. 240) by the January 1949 agreement reducing veterans' seniority.] Of the fifteen laborers so promoted while petitioners were in the military service, all except two moved up to helper positions in accordance with their seniority as laborers.

Despite the veterans' repeated assertions that they would have been promoted before junior laborers (R. 4, 133, 140, 142, 147, 148, 150), and the substantial evidence that promotions to helpers' positions were made in the order of laborer seniority (R. 154, 156, 159, 160–161, 164, 176, 178, 179–180, 230–231), respondents introduced no evidence to show that petitioners would not have been promoted, but relied on the contention that they did not have an absolute right to such promotion and were to be treated the same as furloughed employees.

The restored veteran-petitioners were all qualified to perform the task of machinist helpers,[5] and although they had no absolute right under the collective bargaining agreement to promotion, they would in fact have been promoted, had they remained on the job, when laborers junior to them were promoted.[6]

The carrier virtually admitted this upon their return from the service when it assigned them positions on the seniority roster immediately ahead of machinist helpers promoted from the laborer ranks whose seniority as laborers was immediately below that of the restored veterans (R. 58, 124). This was done pursuant to a memorandum of understanding dated January 15, 1943, under which returning veterans were to "be restored to such position with this Company (in-

[5] This is apparent from their employment as machinist helpers immediately after their return from military service and their retention on the helper roster (R. 8, 123–124).

[6] The veterans asserted in their complaint that they "would have been promoted to mechanics helper at this time had they not been absent in military service" and would have had seniority from that time (R. 4). However, on the theory of the district court, affirmed by the court below, that veterans had to establish (1) a contract right to promotion, and (2) that nonveterans on furlough or leave would have been entitled to the seniority they asserted (*infra*, pp. 7–8), this allegation of fact was rendered irrelevant. Accordingly, the district court made no finding on the point (R. 123–131). But on petitioners' theory of their rights this allegation is critical, and must be taken as true for present purposes, since there are no findings to the contrary and since there is more than substantial evidence in the record that petitioners would in fact have been promoted.

cluding rights to promotion) to which his accumulated seniority entitles him * * * the same as if he had remained in the service" (R. 86).[7]

The district court did not regard as legally relevant the question of whether in fact the restored veterans would have been promoted but for their absence in the armed forces and, as noted above (note 6), made no finding on the point, stating in its conclusions of law that "A great presumption or strong probability that plaintiffs would have been promoted had they remained at their work during the period of their military service does not entitle them to seniority in the promoted position" (R. 133–134). It held that the statute did not guarantee them the right to have time in the armed forces count as time on the job but that the veterans were entitled to seniority as machinist helpers only from the day "on which

[7] An award of the National Railroad Adjustment Board in a similar dispute on another railroad, which the carrier's attorney described as "this case right on the nose" (R. 194), refers to the carrier's position that "it was the custom and practice on this property even before the execution of these agreements for the carrier to promote senior qualified firemen and oiler employes to helper posiitons" (R. 254). Despite the carrier's position, the board concluded in that case that "it is not highly probable that, had he [the restored veteran] remained with the carrier continuously, he would have been promoted" (R. 261–262), after finding that he "might have been promoted to boilermaker helper, or helper in some other craft, before he left to join the army" (R. 260), but that he "had not elected to take promotion before he entered military service and we do not know that he would have elected to take promotion had he been working" (R. 261).

their actual promotion occurred and on which they began work as helpers" (R. 134). The Court of Appeals affirmed on the grounds (1) that promotion was not "automatic," that "although there is a strong probability" of promotion "yet such promotion was not a matter of right or of certainty," and (2) "they would not have obtained the promotions which they are now claiming" if they "had been on furlough or leave of absence, instead of in the service" (R. 269).[8]

REASONS FOR GRANTING THE WRIT

Under the decision below, veterans employed in the railroad industry, in which seniority plays a very important role, lose ground because of their service in the armed forces and have the period of their military service carved out of their seniority as machinist helpers, the positions to which they were promoted on their return. They do not have their time in the army count as time on the job, but occupy the position of machinist's helper with a seniority penalty of three and one-half years, approximately the

[8] The quotations are from the Court's opinion in *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466, 469, upon which the Court relied in affirming without opinion the judgment of the district court (R. 269). That the quotations represent the rationale of the instant decision is apparent, not only from the court's reliance upon its former decision in *Raulins*, but also from the district court's findings of fact (see particularly findings 9, 10 and 12; R. 125–127), and conclusions of law which the Court of Appeals adopted (R. 269).

period of their military service.[9] The necessary effect of the decision below is to deprive the restored veterans of a substantial part of their seniority rights because of their service in the armed forces and to place them at a disadvantage compared with their fellow employees who were not called into military service and remained continuously on the job.

The decision should be reviewed because (1) it fails to apply the interpretation of Section 8 of the Selective Training and Service Act clearly established by this Court in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, to the effect that time in military service must be counted as time on the job, (2) it conflicts in principle with the decisions of the Courts of Appeals for the Seventh and District of Columbia Circuits in *Morris* v. *Chesapeake & O. Ry.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967, and *Conner* v. *Pennsylvania RR.*, 177 F. 2d 854 (C. A. D. C.), certiorari denied, 339 U. S. 919, (3) the statutory provision that the restored veteran "shall be considered as having been on furlough or leave of absence during his period of training

[9] Respondents contended below that the veterans received all they were entitled to for the reason, among others, that they lost no seniority as laborers. This is a rather hollow contention in view of the fact that immediately after their restoration they were employed as machinists helpers, the position to which junior non-veteran laborers had previously been promoted.

and service" has created great confusion in the interpretation of veterans' reemployment rights which should be clarified because of the continuing and growing importance of protecting veterans from being prejudiced by their service in the armed forces, and (4) a great number of veterans are affected by the principles and ruling adopted below.

1. This Court held in its recent decision in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, that the restored veteran's job rights upon reemployment under the Selective Training and Service Act of 1940 were to be measured by the rights he would have enjoyed had he remained continuously in his civilian employment during the period of his military service. In the instant case, the veterans would have been promoted and would have begun work as machinist helpers no later than the seniority dates first assigned them upon their return from military service. Under the collective bargaining agreement, their seniority would have dated from that time had they remained on their civilian jobs. The failure of the court below to recognize their right to such seniority upon their reemployment constitutes an obvious departure from the rule established by this Court.

The applicable measure of the veterans' rights—the positions they would have had if they had remained on the job—upon which the vet-

erans here relied and which was rejected by the court below, was enunciated with unmistakable clarity by its reiteration no less than six times in the *Oakley* opinion. The opinion refers to the "Act's treatment of him [the veteran] as though he had remained continuously in his civilian employment" (p. 279), to "his right to the seniority in the restored position which he would have had if he had remained continuously in his civilian employment" (p. 282), to his right to be restored "to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment" (p. 283), and to "the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment" (p. 284). The decision specifically holds that the veteran "assumes, upon his reemployment, the seniority he would have had if he had remained in his civilian employment" (p. 284), and that the expiration of a year "did not terminate the right of the veteran to the seniority to which he was * * * entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment" (p. 285). The purpose of the Act to protect veterans against penalty for their service to the nation had also been an-

nounced in comparable language in earlier decisions of the Court.[10]

[10] *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275:

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (p. 284).

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284–285).

"He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285).

"Congress protected the veteran against loss of ground or demotion on his return" (p. 286).

Trailmobile Co. v. *Whirls*, 331 U. S. 40:

"The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces" (p. 41).

"That standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (p. 56).

"The men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service" (p. 58).

"The restored veteran, it was held, could not be disadvantaged by his service to the Nation. He 'was not to be penalized on his return by reason of his absence from his civilian job.' 328 U. S. 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence' " (p. 58).

The present pertinence of the *Oakley* decision is emphasized by the fact that the foregoing definition of rights protected by the Act was uttered in a factual context virtually identical to that present here. Neither of the employees involved in that case claimed seniority in the position he had left. One claimed seniority at a different job location from the date he would have been transferred to that location "had he not been in the Armed Forces" (p. 280). The other, who was a machinist helper when inducted, claimed seniority as machinist apprentice from the date he would have been promoted to that position but for his military absence (p. 281). As here, the veterans had to elect to transfer or to qualify for promotion. For nonveterans in these circumstances, seniority would date from the time of actual work on the job. Arguments embodying legal theories similar to those adopted by the court below were advanced in this Court

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Dissenting opinion in *Trailmobile* case:

"In brief, in employments that were governed by priority rights, absence in the armed services was treated as presence in the plant. The veteran acquired a rating which he would have had, had he not been away" (p. 62).

"The veteran at the end of the year certainly is not in a worse position than he would have been had he not been in the armed services" (p. 63).

"In assuring not merely the retention of seniority status but its progression during the years in the service, Congress aimed to insure that the years which the veteran gave to his country should not retard his economic advancement" (p. 63).

and disregarded. Complaints charging, as here,[11] that veterans were denied the seniority they would have had if they had remained continuously in civilian employment were upheld as stating valid causes of action. Although that case happened to deal with the duration of the rights protected by the Act, the rationale of the decision was that the veterans' complaints asserted valid employment rights under the Act which survived one year.

2. In rejecting the petitioners' claim of seniority rights from the time they would have been promoted had they remained on the job, the courts below held (1) that to receive the protection of the Act the veteran must prove an absolute contractual right, automatically effective, rather than a custom, practice or factual certainty of

[11] The stipulation which was adopted by the district court (R. 123) does not and was not intended to deal with this factual issue (R. 138–150). The fact that "Separate and distinct collective agreements are made covering rules and working conditions for employees" in the unskilled and skilled crafts (R. 55), is without significance since there was a contract right in laborers to "be given consideration for promotion" to the skilled crafts on the basis of "ability, merit and seniority" (R. 60). The facts that this provision did not require the promotion of laborers in order of seniority as a matter of legal right, that non-employees were hired as helpers although laborers were available, or that some laborers (principally Negroes, see note 4, *supra*) were not promoted in seniority order (R. 60), obviously do not negative the veterans' assertion that they would in fact have been promoted prior to the promotion of junior laborers had they remained on the job. See pp. 5–7, *supra*.

promotion to a higher job classification had he remained on the job,[12] and (2) that, in any event, the veteran's seniority in the higher job, like that of nonveteran employees on furlough or leave of absence, runs only from the date upon which he actually began work in the higher job.

As shown above, the formula of *Oakley,* that the veteran is entitled to the status he would have enjoyed but for his military service, would seem to foreclose adoption of these rules. But even if *Oakley* is not deemed controlling, the decision below presents a conflict on these grounds with the decisions of two other courts of appeals. *Morris* v. *Chesapeake & Ohio Ry. Co.,* 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Conner* v. *Pennsylvania R. Co.,* 177 F. 2d 854 (C. A. D. C.), certiorari denied, 339 U. S. 919.

In the *Morris* case, the veteran, a telegrapher in the employ of the railroad at the time of his induction, was promoted to the position of train dispatcher upon passing a qualifying examination shortly after his restoration to employment. It had been customary under the collective bargaining agreement to permit telegraphers to apply for the position of train dispatcher in the order

[12] This is made absolutely plain by the District Court's conclusion of law that "A great presumption or strong probability that plaintiffs would have been promoted had they remained at their work during the period of their military service does not entitle them to seniority in the promoted position" (R. 133–4). The Court of Appeals adopted this conclusion (R. 269).

of their seniority as telegraphers, and to promote them if they passed a qualifying examination. The agreement provided that "seniority as dispatcher will date from date employee passes the required examination and qualifies as dispatcher" (p. 580). The veteran claimed seniority, however, from the date upon which the next junior telegrapher had been promoted to the position of train dispatcher during his absence, rather than from the time he passed the examination.

In ruling that the restored veteran was entitled to the seniority claimed, the Court of Appeals for the Seventh Circuit held that the veteran's "military service legally excused him from his failure to bid for the two vacancies filled while he was in the service by two men who were junior to him on the telegraphers' seniority roster" (p. 580). "To hold in this case that Morris should have qualified as a dispatcher before he did, would circumvent the purpose and spirit of the Act" (p. 580).

In the *Conner* case, veterans on the freight trainmen seniority list sought seniority on the passenger trainmen list from the date upon which they would have transferred to the latter list had they remained continuously in their civilian employment. The collective bargaining agreement provided that "when additional passenger trainmen are needed the applications of freight and yard trainmen * * * *shall be given consid-*

eration."[13] If a freight trainmen applied for transfer to the passenger service and was deemed qualified, he was placed at the bottom of the passenger trainmen list. Applications were considered in the order of the seniority of the applicants as freight trainmen. Upon their return from military service, the veterans, who were originally on the freight list, claimed the right to be placed on the passenger list immediately ahead of the men who had been their juniors on the freight list and who had transferred during the period of the veterans' military service.

The Court of Appeals held that under the Act "an employee who enters the military service must be given, upon his return, the same seniority which he would have had had he not been in the service" (p. 857). It pointed out that "When additional passenger trainmen were needed, the *established practice* was to transfer to passenger service *qualified* trainmen in freight service who made application for such transfer and who possessed the highest seniority in freight service" (p. 857). This was described as "an *opportunity to transfer* by election of the employee, the requirement of qualification *being usually, if not universally, met* by employees already in good standing in the freight service" (pp. 857–858). The court concluded therefore "that when the

[13] Italics supplied throughout the discussion of the *Conner* case.

employee returned from the service, he should have been accorded the privilege of transfer which he would have had had he not been in the service" (p. 858). The court explained that the reason for antedating the veterans' seniority "was that they were not present when the opportunities arose. To allow these men to transfer but to place them at the bottom of the list would be to penalize them by reason of their being in the service. The Selective Training and Service Act was designed to prevent that type of treatment" (p. 858).

Both of these cases squarely held, contrary to the decision below, that an opportunity to be considered and to qualify for promotion or change in status, rather than an absolute right automatically effective, was within the protection of the Act. After their return, the veterans were permitted to exercise their election and to qualify. If qualified, they were given seniority as of the date they would have qualified had they remained on the job.

These decisions are opposed to the decision below, not only in rejecting the requirement of an absolute contract right, but also in refusing to limit the rights of veterans to those of non-veterans on furlough or leave of absence. In the instant case, the skilled workers' employment agreement provided that seniority commenced on the date that the employee began work as a machinist helper. The court reasoned that, under

this provision, the seniority of employees on furlough or leave would not start until they were actually on the job, and, therefore, that the seniority of restored veterans, whose status was to be equated with that of employees on furlough or leave, did not begin until they returned from service and actually began work.

In the *Morris* case, employees on furlough or leave would not have been present to qualify for promotion, a contract condition to the commencement of seniority. In the *Conner* case, these employees would not have been present to apply for transfer. There is no suggestion in the opinions that furloughed nonveterans were entitled to a waiver of these contract requirements or that the courts even considered this as relevant. Veterans were held entitled to predated seniority, not because the contract gave furloughed employees this right, but because the Act required the waiver of such conditions where the employee's services in the armed forces made compliance with the conditions impossible.[14]

3. The "furlough or leave of absence" test results from the language of Section 8 (c) which

[14] The suggestion of respondents in the court below that this interpretation of the statute gives veterans the super-seniority outlawed in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, is completely misconceived. The super-seniority there referred to was a status superior to that of nonveterans who remained continuously at work. If veterans were to enjoy no better status than nonveterans who were away from work for other reasons, the statutory protection would be slim indeed.

provides that a restored veteran "shall be considered as having been on furlough or leave of absence during his period of training or service in the land or naval forces" and "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces". But Section 8 (c) also contains the unequivocal direction that employees "shall be so restored without loss of seniority."

The simultaneous application of both provisions in some situations is obviously impossible. In the instant case, for example, where employees on furlough or leave lose seniority by virtue of their absence, the equation of their rights with those of restored veterans results in disregard of the requirement of restoration "without loss of seniority." This apparent dilemma perhaps explains the divergent rules of the different courts.

It is clear, however, that the "furlough or leave" language was not intended to penalize the veteran for his service to his country. In its original form the statutory language contained no reference to "furlough or leave", but required, among other things, that the employee be restored "without loss of seniority." The addition of the "furlough or leave" language was intended to enlarge rather than diminish the protection of the statute, presumably by preserv-

ing a continuous employment relationship.[15] The basic purpose of the statute, to protect restored veterans against losing ground by virtue of their military service, would be nullified if veterans were to suffer loss of seniority because of their absence wherever, under the custom or contract of employment, nonveterans on furlough or leave lost seniority.[16]

The fallacy of the "furlough or leave" test is further disclosed by the provisions and legislative history of the Selective Service Act of 1948.[17] No important substantive changes with respect to reemployment were made in the 1948 act because of the policy that "no reemployment rights should be granted to personnel serving under this

[15] The "furlough or leave" phrases did not appear in S. J. Res. 286, relating to the National Guard, the parallel bill to the Selective Training and Service Act of 1940, which was the first bill to pass both Houses of Congress (86 Cong. Rec. 10759–10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, 54 Stat. 858). When the reemployment provisions of the National Guard Act were carried over into the Selective Service bill (86 Cong. Rec. 10922–10923), paragraph 8 (c) was amended to its present form (86 Cong. Rec. 10914, 11702). The addition of the language relating to the treatment of employees "as on furlough or leave of absence" was explained as intended to enlarge rather than reduce the protection previously accorded (86 Cong. Rec. 11702).

[16] For example, collective bargaining agreements commonly provide that a furloughed employee loses his seniority after a stated period of furlough.

[17] The reemployment provisions of the Selective Service Act of 1948, 62 Stat. 604, were extended indefinitely when, at the time of amendments not relevant here, its name was changed in 1951 to the Universal Military Training and Service Act (65 Stat. 75).

legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." S. Rep. 1268, 80th Cong., 2d sess., p. 15.

Section 9 (c) (2) of the Selective Service Act of 1948, referring to language identical with that contained in Section 8 (b) of the 1940 Act, except for additions not relevant here, provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

This paragraph does not purport to create additional benefits but merely to state the effect of the provisions referred to. Cf. *Stockdale* v. *Atlantic Ins. Co.*, 20 Wall, 323, 336; *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 658. The Senate Report refers to this provision as a "statement of policy regarding application of the 'escalator principle'" (p. 16). The so-called "escalator principle" is obviously a reference to the principle announced by this Court in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, and the policy stated is but a paraphrase and ratification of the

principle announced and repeated in the decisions of this Court. It cannot be reconciled with the decision below that restored veterans are entitled only to seniority equivalent to that of employees on furlough or leave, even though that seniority is less than the seniority enjoyed by employees who remained in continuous employment.

Despite the wide reach of the principle enunciated in this Court's decisions to effectuate the Act's purpose of protecting the returning veteran from prejudice because of his military service, many decisions applying the "furlough or leave" test or other restrictive theories have denied to veterans the status or emoluments they would have enjoyed if they had remained on the job.

Under the interpretations of many courts, the blanket of protection which Congress intended to provide in the enactment of the Selective Service and Training Act of 1940 has worn through in many spots and has become a threadbare cover. For example, since this Court's reversal in *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, of the decision of the court below that the Act gave veterans protection against reduction in seniority not enjoyed by non-veterans remaining on the job, the Court of Appeals for the Sixth Circuit, through a misinterpretation of this Court's decisions in *Fishgold* and *Whirls,* has consistently denied veterans' claims to the normal incidents of their employment status that they would have enjoyed had they remained continuously at work. See

Gregory v. *Louisville & Nashville R. Co.,* 191 F. 2d 856 (the instant case); *Brown* v. *Watt Car & Wheel Co.,* 182 F. 2d 570; certiorari denied, 340 U. S. 875, *Nevins* v. *Curtiss-Wright Corp.,* 172 F. 2d 535; *Trischler* v. *Universal Potteries, Inc.,* 171 F. 2d 707; *Haynes* v. *Southern Ry. System,* 171 F. 2d 128, reversed, 338 U. S. 278; *Oakley* v. *Louisville & N. R. Co.,* 170 F. 2d 1008, reversed, 338 U. S. 278; *Raulins* v. *Memphis Union Station Co.,* 168 F. 2d 466.

The decisions of other courts of appeals have similarly penalized veterans because of their absence in military service. Promotions which veterans would have received have been refused (*Lipscomb* v. *Tennessee Coal Iron & R. Co.,* 189 F. 2d 708 (C. A. 5); *Special Service Co.* v. *Delaney,* 172 F. 2d 16 (C. A. 5); *Hewitt* v. *System Federation No. 152, etc.,* 161 F. 2d 545 (C. A. 7); *Spearmon* v. *Thompson,* 167 F. 2d 626 (C. A. 8) (Delozier)); military service has not been counted in computing length of service where relevant in determining both severance pay (*Seattle Star* v. *Randolph,* 168 F. 2d 274 (C. A. 9)), and the pay rate on the job (*Harvey* v. *Braniff International Airways, Inc.,* 164 F. 2d 521 (C. A. 5); *Altgens* v. *The Associated Press,* 188 F. 2d 727 (C. A. 5)); vacation pay has been denied (*Foster* v. *General Motors Corp.,* 191 F. 2d 907 (C. A. 7)); probationary (*Lesher* v. *P. R. Mallory & Co.,* 166 F. 2d 983 (C. A. 7)), and furloughed (*Barbee* v. *Capital Airlines,* 191 F. 2d

507 (C. A. D. C.), certiorari denied January 7, 1952) employees have lost their jobs.

In other cases, however, the Act has been applied to make the veterans whole by treating them as though they had remained at work regardless of the existence of absolute contract rights to advancement or the rights of employees on non-military absences. See, for example, *Conner* v. *Pennsylvania R. R., supra; Spearmon* v. *Thompson,* 167 F. 2d 626 (C. A. 8), certiorari denied, 335 U. S. 822; *Morris* v. *Chesapeake & O. Ry.,* 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Levine* v. *Berman,* 161 F. 2d 386 (C. A. 7); *Schreier* v. *M. H. Fishman Co.,* 176 F. 2d 722 (C. A. 3); *Loeb* v. *Kivo,* 169 F. 2d 346 (C. A. 2); *Mentzel* v. *Diamond,* 167 F. 2d 299 (C. A. 3); *MacLaughlin* v. *Union Switch & Signal Co.,* 166 F. 2d 46 (C. A. 3); *Payne* v. *Wright Aeronautical Corp.,* 162 F. 2d 549, 551–552 (C. A. 3); *Trusteed Funds, Inc.* v. *Dacey,* 160 F. 2d 413 (C. A. 1); *Rudisill* v. *Chesapeake & O. Ry. Co.,* 167 F. 2d 175 (C. A. 4). At times, results have varied in the same circuit with differences in factual situations which should be legally irrelevant.

Determination of the questions presented by the present case should go far to resolve the uncertainty, confusion, and conflicts now existing with respect to veterans' reemployment rights. Reestablishment of the basic principle that veterans are to be treated as if they had been continuously on the job will both bring order into this semi-anarchic field and also relieve many vet-

erans of undue economic penalties flowing from their military service.

4. We have been advised by the Department of Labor that the rights of some 800 veterans in the employ of the Louisville & Nashville Railroad are affected by the instant decision. The same question is presented in *Bunner* v. *B. & O. R. R.*, now pending in the District Court for the Northern District of West Virginia. If the decision below remains as the governing principle, all seniority rosters of the Baltimore and Ohio Railroad not merely those affected by the *Bunner* case, would be revised.[18]

The questions presented here occur in identical or related form in virtually all unionized industries where seniority and other job rights "derive their scope and significance from union contracts."[19] See *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521, 526.[20] The problems are of

[18] The 1943 Agreement (*supra*, pp. 6–7), pursuant to which the veterans' seniority was first antedated, was the standard agreement adopted on most railroads throughout the country.

[19] See United States Department of Labor, Bulletin No. 908–7, pp. 17–26; United States Department of Labor, Bulletin No. 908–11, pp. 3–22, *passim.* See also, *e. g.*, collective bargaining agreement between United Steel Workers of America and Bethlehem Steel Co.; between International Brotherhood of Electrical Workers and Southern California Edison; between United Auto Workers and General Motors Corporation; between Textile Workers Union and Industrial Rayon Corp.

[20] The court below relied upon this decision in affirming the judgment of the district court for reasons which are not entirely clear. It appears to have been cited for the proposition that veterans' seniority rights must be determined in accordance with the terms of the applicable collective bar-

importance in determining not only existing rights under the Selective Training and Service Act of 1940 which are still being litigated,[21] but also rights under the Selective Service Act of 1948, as amended, which contains the same statutory language and thus presents the same problems of interpretation for the future.[22]

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gaining agreement, and since the agreement here required employees to begin work before their seniority would start, that veterans can claim seniority from no earlier date. The *Campbell* decision makes clear, however, that the employment contract fixes only those rights which affect veterans and non-veterans alike. Provisions which have the effect of penalizing veterans because they were in military service are not binding upon them. Consequently, the contract provision involved here is not controlling. See also *Fishgold* v. *Sullivan Dry Dock and Repair Corp.*, 328 U. S. 275, 285. If the veteran were required to look only to the agreement for the determination of his rights, the statutory protection would be virtually nullified. Both the agreement and the Act are given appropriate effect by looking to the agreement to ascertain the rights of non-veterans and then applying the Act to guarantee to veterans the same rights as they would have enjoyed under the agreement had they not gone into military service but had remained continuously on the job.

[21] The Thirty-Eighth Annual Report of the Secretary of Labor (1950) includes "the veteran's rights to promotions" among important issues which "are still undetermined and await further litigation" (p. 78). Referring to "the outbreak of hostilities in Korea," the Secretary of Labor reports "an immediate manifestation of interest by persons likely to be called into military service concerning their right to return to their civilian employment." *Ibid.*

[22] Secretary of Defense Marshall testified that a Military Establishment of three and one-half million would require replacements of 800,000 annually. Hearings before House Committee on Armed Services on H. R. 1752, 82d Cong., 1st

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1952.

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sess., p. 17. In his State of the Union message this year, the President disclosed that the Armed Forces have almost reached the 3,500,000 mark. 98 Cong. Rec. 30 (unbound edition).

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APPENDIX

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U. S. C. App. 308, reads in part, as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this Act for training and service shall be given a physcial examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department: *Provided,* That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ

of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces,

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and shall not be discharged from such position without cause within one year after such restoration.

(d) Section 3 (c) of the joint resolution entitled "Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service", approved August 27, 1940, is amended to read as follows:

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's un-

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lawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits.

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No. 538.

IN THE

Supreme Court of the United States

October Term, 1951.

HARRY GREGORY, ET AL., - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD CO., ET AL., - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, IN OPPOSITION.

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February 29, 1952.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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